

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES M. UPTHEGROVE,

Petitioner,

v.

WISCONSIN DOC and
JANE DOE, Records Custodian,

Respondents.

ORDER

07-C-217-C

In response to this court's order of May 9, 2007, petitioner James M. Upthegrove and the warden of the Prairie du Chien Correctional Institution have submitted trust fund account statements so that the court may calculate petitioner's initial partial payment of the \$350 fee for filing this lawsuit. From these statements, it appears that while he was confined at the Prairie du Chien institution, petitioner was receiving periodic deposits to his prison account, including two deposits of \$100 each. From January to mid-March, petitioner was not in custody. On March 14, 2007, when he was re-incarcerated at the Eau Claire county jail, petitioner had \$16.46 in his possession, which was confiscated immediately to pay jail resident fees. Petitioner received no other credits to his account between March 14, 2007

and April 22, 2007, when his statement ends. He presently owes the jail a debt totaling \$450.62.

The procedure mandated by Congress in 28 U.S.C. § 1915(b) for determining the amount of an initial partial payment is to calculate the amount equal to 20% of the greater of a prisoner's average monthly balance or his average monthly deposits for the six-month period immediately preceding the date he filed his complaint. When I follow that procedure in petitioner's case, the amount of the initial partial payment is \$16.01, which I will order petitioner to pay.

I recognize that petitioner may be tempted to respond immediately to the order by explaining that he does not have \$16.01 in his jail account. Indeed, his statement shows that he has nothing in his account except a sizable negative balance. Nevertheless, petitioner should be aware that his immediate lack of income is not sufficient by itself to allow waiver of the initial partial payment. 28 U.S.C. § 1915(b)(4), the waiver provision, states,

In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

However, in Newlin v. Helman, 123 F.3d 429, 435 (7th Cir. 1997), rev'd on other grounds by Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000) and Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000), the Court of Appeals for the Seventh Circuit ruled that a prisoner has "means" any time his trust fund account statement reveals periodic income.

[I]t is not enough that the prisoner lack assets on the date he files. If that were so, then a prisoner could squander his trust account and avoid the fee. Section 1915(b)(4) comes into play only when the prisoner has no assets and no means by which to pay the initial partial filing fee. A prisoner with periodic income has "means" even when he lacks "assets."

Here, it is too soon to say that petitioner does not have periodic income. He may have received one or more deposits to his account in the time that has passed between April 22 and now, and he may receive additional deposits in the next few months. Under the holding of Newlin, he will not be eligible for waiver of the initial partial payment under § 1915(b)(4) until his six-month trust fund account statement reveals the absence of periodic income. Thus, if petitioner does not presently have \$16.01 in his account, he is free to request an enlargement of time in which to pay the amount. If, even with a modest extension, he cannot pay the assessment, I will dismiss the case without prejudice to his refile his complaint at such time as his statement reveals that he has not enjoyed periodic income for six months and thus qualifies for waiver of the payment under § 1915(b)(4).

One other matter requires comment. In Walker v. O'Brien, 216 F.3d at 628, the court of appeals held that initial partial payments are to "come off the top" of all deposits to a prisoner's account. That means that the initial partial payment assessed in this order is to be given priority over debts petitioner might owe to the jail or other courts. In other words, if petitioner were to receive a deposit of \$20 to his account next week, for example, \$16.01 of that deposit must be sent to this court to pay petitioner's initial partial payment.

If petitioner finds that jail staff members misunderstand their responsibilities in this regard, he may make a copy of this order available for their review.

ORDER

IT IS ORDERED that petitioner is assessed \$16.01 as an initial partial payment of the \$350 fee for filing this case. He is to submit a check or money order made payable to the clerk of court in the amount of \$16.01 on or before June 12, 2007. If, by June 12, 2007, petitioner fails to make the initial partial payment or advise the court that he needs more time within which to do so, he will be held to have withdrawn this action voluntarily. In that event, the clerk of court is directed to close this file without prejudice to petitioner's filing his case at a later date.

Entered this 23d day of May, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge